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IN THE

Supreme Court of the United States

October Term, 1965

No. 589

SHAPIRO & SON CURTAIN CORP.,

Petitioner,

against

BASIL GLASS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

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LEON SILVERMAN,
MILTON R. ACKMAN,
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IN THE

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No. 589

SHAPIRO & SON CURTAIN CORP.,

Petitioner,

against

BASIL GLASS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

This brief is submitted by respondent in opposition to petitioner's Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit.

Opinions Delivered in Courts Below

The opinion of the Court of Appeals for the Second Circuit is reported at 348 F. 2d 460 and is set forth in the Appendix to the Petition. The opinion and order of the District Court is unreported and is set forth in the Appendix (*infra*, pp. 14-15).

Question Presented

Did the courts below abuse their discretion in holding immune from service of process a resident of England who came to New York for the purpose of being examined in an action pending in the United States District Court for the Southern District of New York?

Facts

Respondent, Basil Glass (hereinafter called "Glass"), is a director of Everwear Candlewick, Ltd. (hereinafter called "Everwear"), which corporation is the plaintiff in an action entitled *Everwear Candlewick, Ltd.*, v. *Shapiro & Sons Curtain Corp.*, Civil Action No. 1970/1964, United States District Court for the Southern District of New York (hereinafter called the "prior action"). The defendant in the prior action and petitioner herein, Shapiro & Son Curtain Corp. (hereinafter called "Shapiro"), requested that Everwear be examined by its director, Glass. Glass has been for all of his life a citizen of Britain. He resides and is domiciled in London, England.

Glass came to New York City, New York on Saturday, January 23, 1965 solely for the purpose of being examined before trial upon oral deposition in said action. While he was here for that purpose and while he was being examined by the attorneys for Shapiro in the United States Court House at Foley Square, New York City, New York on Tuesday, January 26, 1965, he was served with the process which is the subject of the instant petition.

The attorneys for Everwear advised the attorneys for Shapiro that Glass would be here solely in connection with his deposition by letter on January 21, 1965.

After Glass was served with process during the course of the deposition, at the request of Shapiro's attorneys and with the concurrence of Everwear's attorney, Shapiro's attorneys were permitted to examine Glass at length and in detail about Glass' purpose in coming to New York and his activities in New York from and after his arrival on Saturday, January 23, 1965. Glass testified that he came to New York City solely for the purpose of being examined by Shapiro's attorneys; on Saturday, January 23, 1965, he remained in his hotel room except for a visit to the New York Boat Show; on Sunday, January 24, 1965, he

stayed at his hotel all day except for dinner, which he had with two old friends; on Monday, January 25, 1965, he was at his attorneys' offices all day discussing the prior action and his prospective deposition; on Monday evening he had dinner with one of his attorneys and the wife of that attorney; and that while he was in New York City he did not transact any business.

The substance of Glass' testimony was set forth in the affidavit submitted in support of the motion to quash (*infra*, pp. 16-18). Those facts were not controverted by Shapiro, but rather Shapiro suggested that during the course of dinner with his friends on Sunday evening, Glass discussed the prior action with his friends and thereby lost his immunity.

The motion came on to be heard in the District Court on Thursday, January 28, 1965. The District Court held that Glass, as a non-resident participating in a judicial proceeding, was immune from service of process. With respect to Shapiro's claim that Glass had lost his immunity, the District Court held:

> "Finally, a claim is made that Glass lost the immunity because he conducted business while he was within this jurisdiction. If the presence in the jurisdiction was primarily for a business purpose other than the litigation at hand, this would be true, but such is not the case here. Glass arrived in this country on Saturday and, aside from going to the boat show that day, he was not otherwise engaged. On Sunday he spent the whole day at his hotel except for having dinner with two people, one of whom plaintiff claims was involved in the first action. The affidavit in opposition to this motion states:
>
> > 'Conversations with the officers of the plaintiff have indicated that the said Basil Glass probably discussed various phases of the instant litigation with the said Samuel Goodman.'
>
> The persons with whom the attorney for the plaintiff discussed the matter and the substance of the conversations are not indicated. Furthermore, the

> conclusion that Glass 'probably discussed' phases of the instant litigation is insufficient. On Monday Glass conferred with his attorneys preparatory to his deposition on Tuesday, at which time he was served with process. Even assuming that Glass did discuss phases of the litigation with Goodman, such meeting was only a fractional part of Glass' stay in this country'' (*infra,* p. 15).

The District Court's order quashing the service of process was unanimously affirmed by the Court of Appeals for the Second Circuit.

POINT I

(Answering Petitioner's Point I.)

The finding that Glass was immune from service of process was mandated by the precedents in this Court, including *Lamb* v. *Schmitt,* 285 U. S. 222.

It has long been well settled that a non-resident who comes into a foreign jurisdiction to participate in a judicial proceeding is immune from service of process while coming, attending the proceedings and leaving that jurisdiction. *Stewart* v. *Ramsay,* 242 U. S. 128, 129 (1916); *Page Co.* v. *MacDonald,* 261 U. S. 446, 448 (1923); *Lamb* v. *Schmitt,* 285 U. S. 222, 225 (1931); *In Re Equitable Plan Company,* 277 F. 2d 319 (2d Cir. 1960); 2 *Moore's Federal Practice* (2d Ed. 1964) pp. 1093-1094.

Here, as in *Stewart* v. *Ramsay, supra,* Everwear would effectively be barred from commencing an action in New York if to do so would subject its officers and directors to the necessity of defending, thousands of miles from their homes, actions for substantial damages.

Shapiro evidently claims that the action instituted against it by Everwear was improperly instituted and the very bringing of the action has caused Shapiro damage. That very claim was asserted in *Page Co.* v. *MacDonald,*

supra, where Page Co. claimed that MacDonald libeled Page Co. in an action instituted by MacDonald. While MacDonald was appearing before a special master in the first action, she was served with a summons and complaint which claimed damages based upon the bringing of the first action. In sustaining the quashing of the service of process, this Court held that even when the wrong complained of by Page Co. was the institution of the first action, MacDonald was immune from service of process while attending a judicial proceeding in the first action.

Shapiro argues that the limited exception to the grant of immunity applied by this Court in *Lamb* v. *Schmitt, supra,* is applicable here. However, the facts at bar do not begin to approach the compelling circumstances present in the *Lamb* case. In *Lamb* the plaintiff was a receiver who brought suit to set aside and impress a trust on certain alleged fraudulent conveyances made by one, Holland, to his wife. Lamb was an out-of-state attorney who came to Mississippi for the purpose of representing Mrs. Holland in an action brought to set aside the conveyances to her. During the course of the action Lamb received $70,000 which he claimed Mrs. Holland paid to him as legal fees, but which the plaintiff claimed actually belonged to the judgment debtor. Lamb was served with process in a second action brought by the receiver to recover the $70,000 paid to him by Mrs. Holland (see *Schmitt* v. *Lamb,* 43 F. 2d 770, 771 (N. D. Miss. 1930)).

Lamb moved to quash the process served upon him and this Court denied his application, holding that the traditional immunity would not be granted where ". . . the immunity, if allowed, might paralyze the arm of the court and defeat the ends of justice in the very cause for the protection of which the immunity is invoked". 285 U. S. at 226. Here no claim can be made that to afford Glass immunity would "paralyze the arm of the court", nor in any way prejudice the conduct of the action between Everwear and Shapiro. In fact, the converse is true. If every

director of Everwear is subject to process merely if he comes to New York to participate in the prior action, then it is obvious that, save in the most exceptional case, it would be better for Everwear to suffer the damages already sustained than have its executives exposed to vexatious and harassing lawsuits.

Moreover in *Lamb* this Court noted (285 U. S. at 227):

> "From the viewpoint of the due administration of justice in the first suit, the second was as much a part of it as if it had been an interlocutory motion to compel the production in court of documents or of property involved in the suit."

Here even Shapiro cannot claim that the action at bar is as much a part of the prior action as an interlocutory motion. In fact, Shapiro expressly alleges that the claim asserted against Glass is a claim cognizable "... only after another claim has been presented to a conclusion" (Complaint, par. Sixth).

The cases that have been decided subsequent to *Lamb* show that the special limitation on the grant of immunity applied in *Lamb* will be most sparingly allowed and only when it is virtually impossible to conduct the prior litigation without the joinder of the non-resident as a party to an action in the same district. See, *e.g.: In Re Equitable Plan Company, supra,* 277 F. 2d at 320; *United Nations* v. *Adler,* 90 F. Supp. 440 (S. D. N. Y. 1950); *Lovejoy* v. *Foster,* 77 F. Supp. 414 (N. D. Tex. 1948); *Sheeran* v. *Ravella,* 18 F. R. D. 411 (M. D. Pa. 1956); and *International Plastics Harmonica Corp.* v. *Harmonic Reed Corp.,* 69 F. Supp. 515, 516 (E. D. Pa. 1946).

Shapiro in effect claims that it may be inconvenienced if, after the trial of the prior action, it obtains a judgment against Everwear which proves to be uncollectable. It may then have to seek recourse against Glass in a second action. Assuming *arguendo* that Shapiro's position is sound in all respects, the inconvenience to Shapiro is irrelevant. As

Judge Kirkpatrick held, the mere fact that immunity "may preclude a shortcut to the final disposition of all the controversies connected with the subject matter at issue is not sufficient". *International Plastics Harmonica Corp.* v. *Harmonic Reed Corp., supra,* 69 F. Supp. at 516.

Glass was advised by counsel that he would be immune from process if he entered this jurisdiction for the purpose of being examined by the plaintiff herein. As Judge Friendly noted in *In Re Equitable Plan Company, supra,* 277 F. 2d at 320, the time-honored immunity for such non-residents must be uniformly applied if non-residents are to be encouraged to participate in judicial proceedings. Otherwise, the purpose of the immunity will be subverted, since no one could advise a client as to his potential status upon entering a foreign jurisdiction.

In short the Courts below properly exercised their discretion in ruling Glass immune from service of process. Their determination was completely consistent with the principles announced in *Lamb* v. *Schmitt, supra* and there is no compelling reason for this Court to review the exercise of discretion below.

POINT II

(Answering Petitioner's Point II.)

The facts at bar are distinguishable from those in *Calada* v. *Walker*, 309 F. 2d 74. The decision below does not conflict with any other Circuit Court determination but rather reflects a provident exercise of discretion.

We have noted that the exercise of discretion by the Courts below was completely consistent with the decisions in this Court. The Court of Appeals held that "[o]n balance, the inconvenience to Shapiro is far out-weighed

by the Court's interest in securing the participation of non-residents in civil proceedings." That determination does not conflict with, and certainly cannot be said to be "directly contrary" to the holding in *Calada* v. *Walker*, 309 F. 2d 74 (10th Cir. 1962). In fact, *Calada* is distinguishable from the case at bar.

In *Calada,* a corporation brought an action in the Colorado State courts on a judgment obtained in California. The defendant served the *corporation* in Colorado by serving a summons and complaint filed in the District Court on the corporation's secretary-treasurer. The defendant claimed that the California judgment was fraudulently obtained. The Tenth Circuit held that the corporation was not immune from service of process. The Court held that since the two actions involved the single judgment the non-resident corporation suing on the judgment should not be immune from suit in Colorado based upon the manner in which the judgment was obtained.

Here, Glass is not a plaintiff. Moreover the claim asserted in the case at bar is that the prior action instituted by Everwear was instituted without probable cause and constitutes an abuse of process. That claim is insufficient to strip a non-resident of his immunity. *Page Co.* v. *MacDonald, supra,* 261 U. S. at 448.

In short, the fact that the courts below exercised their discretion to vacate process while the Tenth Circuit in *Calada,* on a different state of facts, determined that the ends of justice would be served by sustaining the service of process does not present a conflict between the determinations of the Second and Tenth Circuit Courts.

POINT III

(Answering Petitioner's Point III.)

There is no important public question raised by the petition.

The question raised by the petition is one that uniquely concerns Glass, Shapiro and Everwear. This case certainly poses no important issue of law since the determination below involved the application of well settled principles and the provident exercise of discretion. At most it involves a very limited refinement of the grounds upon which discretion in this type of case will be exercised.

The immunity afforded Glass did not turn upon the fact that he was an alien. The same rules apply whether Glass is a resident of Colorado or of Massachusetts (see *Stewart* v. *Ramsey,* and *Page Co.* v. *McDonald, supra*) or of a foreign country (see *In Re Equitable Plan Company, supra*).

Glass is no more immune from suit upon an alleged tort he committed against Shapiro than a resident of Canada or any State would be immune from suit. The only issue raised herein is whether Glass has to defend an action thousands of miles from his home when he is served in New York during the course of a judicial proceeding. Glass, as well as other non-residents, is still subject to service of process for whatever tort he has committed where he lives and works, and jurisdiction over him can be obtained there.

Petitioner's suggestion that Glass formed a financially irresponsible corporation in order to commence the litigation against Shapiro has no basis in fact. *Everwear* and *Shapiro* were the parties to the agreement upon which Everwear's claim against Shapiro is based. Glass, on the other hand, was not a party to that agreement.

Finally, we have noted that the immunity afforded Glass was not based upon the fact that he is an alien but rather turns upon the fact that Glass was a non-resident of New York at the time that he was served in New York. We have already noted that whether he was a resident of a State other than New York, or of a foreign country would not have changed the result. Thus, aliens are not granted greater rights than the citizens of the United States by reason of the determination below. It is at best specious so to argue.

POINT IV

(Answering Petitioner's Point IV.)

Shapiro's rights under the Fifth Amendment of the Constitution of the United States have not been violated by the decision below.

It is difficult to follow the argument set forth at Point IV of petitioner's brief. Shapiro has counterclaimed against Everwear in the prior action. If Shapiro succeeds in its counterclaim it may be awarded judgment. If that judgment cannot be satisfied in the State of New York, Shapiro can seek execution on the judgment where Everwear is domiciled. The fact that Glass is not a party to another action brought by Shapiro does not lessen any rights that Shapiro may have in the action instituted by Everwear.

Whatever rights Shapiro had against Glass it still has. Glass has not brought an action against Shapiro in New York and it is certainly not unfair to grant Glass immunity from process when he comes here in order to participate in a judicial proceeding. Glass remains subject to the jurisdiction of the courts where he lives and works. In short, it is incomprehensible to us how Shapiro's rights under the Fifth Amendment of the Constitution of the United States have been violated by the decision below.

POINT V

(Answering Petitioner's Point V.)

Petitioner's attorneys were in fact allowed to cross examine Glass under oath as to his activities in New York when he was served. The uncontroverted facts below did not warrant a hearing since, giving the petitioner the benefit of every inference, the District Court properly found that Glass was not in New York primarily to conduct business.

Glass was served with process while being deposed in the prior action. Since they were immediately advised that a motion would be made to vacate the service, Shapiro's attorneys requested to examine Glass as to his activities in New York prior to service. They were invited to examine Glass as if they were proceeding to examine him on a hearing held in conjunction with his application to vacate the service.

Shapiro's attorneys did so examine Glass. He testified in substance that he came to New York solely to be examined in the prior action; that after arriving on Saturday, January 23, 1965, he stayed in his hotel room except for a visit to the New York Boat Show; that on Sunday, January 24, 1965, he stayed at his hotel except for dinner with two friends; that on Monday, January 25, 1965, he spent the entire day at the offices of his attorneys, discussing the litigation and his deposition; that on Monday evening he had dinner with one of his attorneys and the wife of that attorney; and that on Tuesday he went to the Federal Court House to be deposed when he was served with process.

The substance of Glass' testimony was set forth in the affidavit submitted in support of the motion to quash. These facts were not controverted by Shapiro, but rather Shapiro suggested that during the course of dinner with

his friends on Sunday evening, Glass discussed the prior action and thereby lost his immunity.

We submit that the District Court's ruling on Shapiro's claim was entirely sound. Even assuming Glass discussed the prior action with friends during the course of dinner, that discussion was a fractional part of his stay in New York. Shapiro did not controvert the fact that Glass had come to New York to be examined.

In short, on the basis of the uncontroverted facts it was clear that Glass' overriding purpose in coming to New York was to be deposed by Shapiro's attorneys, and therefore he was immune from service of process when he was served. See 2 *Moore's Federal Practice* (2d Ed. 1964), p. 1102.

Furthermore, no hearing was necessary since Shapiro's attorneys in fact examined Glass, and they were not prevented from adducing whatever evidence they had on the motion. There was no reason for the Court to delay Glass' return to his home and no error was committed below.

POINT VI

(Answering Petitioner's Point VI.)

It is clear that Federal Law governs the grant of immunity from service of process issued by the United States District Court for the Southern District of New York to a person appearing for a deposition in an action pending in that Court. Shapiro did not argue below that New York law applied, and even if New York law were applied Glass would be afforded immunity under the facts at bar.

Below Shapiro did not urge that the law of New York applied. In any event, it is clear that the federal courts apply federally created principles in determining whether

a person attending on a judicial proceeding pending in the District Court is immune from service of process issued by the District Courts. 2 *Moore's Federal Practice* (2 Ed. 1964), pages 1092-1093.

Moreover, as the Court of Appeals noted, New York law affords immunity to non-resident parties who come to New York to testify in examination before trial pursuant to an order for their examination. *New England Industries* v. *Margiotti,* 270 App. Div. 488, 491 (1st Dept. 1946), affirmed 296 N. Y. 722 (1946). And see *Thermoid Co.* v. *Fabel,* 4 N. Y. 2d 494, 499 (1958). *Koral* v. *Savory Inc.,* 254 App. Div. 692, 4 N. Y. S. 2d 576 (2d Dept. 1938) cited by petitioner, is a memorandum affirmance by the Appellate Division for the Second Department of an unreported decision. Whatever may have been decided by that case, the subsequent decisions by New York's highest court cited above are controlling and they would afford Glass immunity.

In short, this case presents no problem under *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64. Federal principles clearly control and even if New York law were to be applied, Glass would still be immune from service of process.

CONCLUSION

For all of the foregoing reasons Petitioner's application should be denied.

Dated: October 15, 1965.

Respectfully submitted,

STRASSER, SPIEGELBERG, FRIED & FRANK,
Attorneys for Respondent,
Basil Glass.

LEON SILVERMAN,
MILTON A. ACKMAN,
of Counsel.

APPENDIX

Opinion and Order of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Civ. 212

SHAPIRO & SON CURTAIN CORP.,

Plaintiff,

against

BASIL GLASS,

Defendant.

METZNER, D. J.:

Defendant Glass moves to vacate service of the summons and complaint on the ground that the defendant was immune from service of process at the time he was served.

Defendant is a director of Everwear Candlewick, Ltd., which corporation is the plaintiff in an action against Shapiro & Sons Curtain Corp. The latter corporation instituted suit against Glass by the service of a summons and complaint upon him in this courthouse, where he was testifying in deposition proceedings pursuant to an order in the first action.

While there is a relationship between the two actions, I find that this relationship does not come within the situation covered in *Lamb* v. *Schmitt,* 285 U. S. 222 (1932); *In re Equitable Plan Co.,* 277 F. 2d 319 (2d Cir. 1960); *United Nations* v. *Adler,* 90 F. Supp. 440 (S. D. N. Y. 1950).

Plaintiff claims that Glass's presence in this jurisdiction was not a voluntary act upon his part. The fact that Glass was present in the jurisdiction pursuant to an order of this court does not change the result. *In re Equitable*

Plan Co., supra; Dwelle v. *Allen*, 193 Fed. 546 (S. D. N. Y. 1912).

Finally, a claim is made that Glass lost the immunity because he conducted business while he was within this jurisdiction. If the presence in the jurisdiction was primarily for a business purpose other than the litigation at hand, this would be true, but such is not the case here. Glass arrived in this country on Saturday and, aside from going to the boat show that day, he was not otherwise engaged. On Sunday he spent the whole day at his hotel except for having dinner with two people, one of whom plaintiff claims was involved in the first action. The affidavit in opposition to this motion states:

> "Conversations with the officers of the plaintiff have indicated that the said Basil Glass probably discussed various phases of the instant litigation with the said Samuel Goodman."

The persons with whom the attorney for the plaintiff discussed the matter and the substance of the conversations are not indicated. Furthermore, the conclusion that Glass "probably discussed" phases of the instant litigation is insufficient. On Monday Glass conferred with his attorneys preparatory to his deposition on Tuesday, at which time he was served with process. Even assuming that Glass did discuss phases of the litigation with Goodman, such meeting was only a fractional part of Glass's stay in this country.

Motion to quash is granted, and the complaint dismissed. So ordered.

Dated: New York, N. Y.
February 17, 1965

CHARLES M. METZNER,
U. S. D. J.

Affidavit in Support of Motion to Vacate Service of Process

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

65 Civil 212

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MILTON R. ACKMAN, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of Strasser, Spiegelberg, Fried & Frank, attorneys for defendant, and I make this affidavit in support of defendant's application to quash the summons and complaint served on defendant on January 26, 1965. (A copy of said summons and complaint will be handed up to the Court on the return day of this motion.)

2. Defendant is a Director of Everwear Candlewick, Ltd. which company is the plaintiff in an action entitled *Everwear Candlewick, Ltd.* v. *Shapiro & Sons Curtain Corp.*, Civil Action No. 1970/1964, United States District Court for the Southern District of New York. The defendant in that action requested that plaintiff in that action be examined by its Director, Basil Glass. Basil Glass came to this jurisdiction on January 23, 1965 solely for the purpose of being examined before trial in said action. While he was here for that purpose and while he was being examined by the attorneys for Shapiro & Son Curtain

Corp. in room 615A of the Courthouse of this Court on January 26, 1965, he was served with the process which is the subject of the instant application.

3. I advised the attorney for the plaintiff herein that Basil Glass would be here solely in connection with his deposition by letter on January 21, 1965. Prior to the service of the process herein I have had conversations with I. Walton Bader, Esq., one of the attorneys for the plaintiff in this action. During the course of these conversations, Mr. Bader (who is the attorney for the defendant in Civil Action 1970/1964) "threatened" that if Basil Glass came to New York he would serve him with process. I told Mr. Bader that Mr. Glass would be immune from process if he came here solely to be examined before trial, and Mr. Bader conceded as much. It is obvious that the service of process at bar was merely a naked and outrageous attempt to cause Mr. Glass further inconvenience and expense.

4. During the course of the deposition of Basil Glass this day I permitted Mr. Bader to examine Mr. Glass at length and in detail about Glass' purpose in coming to New York and his activities here since he arrived on Saturday, January 23, 1965. Mr. Glass testified:

(a) He came to New York solely for the purpose of being examined by Mr. Bader.

(b) On Saturday, January 23, 1965, he remained in his hotel room except for a visit to the Boat Show.

(c) On Sunday, January 24, 1965, he stayed at his hotel all day except for dinner, which he had with two old friends.

(d) On Monday, January 25, 1965, he was at our offices all day discussing Civil Action 1970/1964 and his coming deposition.

(e) On Monday evening he had dinner with John F. Finn, Jr., a member of the firm of Strasser, Spiegelberg, Fried & Frank, attorneys for plaintiff, and his wife.

(f) While he has been here he has not transacted any business.

5. During the course of the deposition Mr. Bader stated that it was agreeable to him that this order to show cause be set down for hearing on Thursday, January 28, 1965. Mr. Glass will be in Court on that day (if this application be made returnable on that date) should the need to examine him further arise. Since Mr. Glass has come here at great cost and inconvenience and he would like to return to his business and home in London, England, it is respectfully requested that this application be set down for hearing on Thursday, January 28, 1965. Once any hearing on this application is held and concluded, Mr. Glass will then be able to return home. He now has confirmed reservations to leave New York for London on Friday morning, January 29, 1965.

6. No previous application has been made for the relief sought herein.

WHEREFORE, I respectfully pray that this Court (a) sign the order to show cause and make this application returnable on Thursday, January 28, 1965; and (b) on the hearing of this application, vacate and set aside the process served upon defendant and dismiss the action with costs and disbursements.

MILTON R. ACKMAN.

(Sworn to January 26, 1965.)

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SHAPIRO & SON CURTAIN CORP.,
Petitioner,

AGAINST

BASIL GLASS,
Respondent.

PETITIONER'S REPLY

SHAPIRO & SON CURTAIN CORP.,
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Respondent.

PETITIONER'S REPLY

The respondent's brief in opposition to the petition for a writ of certiorari clearly indicates the reason why the petition should be granted. There are however, certain inaccuracies in the respondent's brief which petitioner would like to call to the court's attention.

POINT I

Calada v. *Walker* is not distinguishable.

The respondent claims that the Tenth Circuit determination in *Calada* v. *Walker*, 309 Fed. (2d) 74 is distinguishable from the case at bar because the *specific facts* are slightly different from the *specific facts* in the case at bar.

Calada, on the other hand, did not turn on these specific facts but set forth the general proposition that where the later action, in which the immunity from service is claimed, arises out of or involves the same subject matter as the one in which the non-resident has voluntarily attended, the immunity is not present. This was specifically set forth in the *Calada* decision as follows:

> "* * * The immunity should not be enlarged or extended beyond the reason upon which it is founded. Lamb v. Schmitt, supra. Accordingly, certain well-recognized exceptions to the general rule have been established. One of these generally recognized exceptions denying or withholding immunity is where the later action, in which the immunity from service is claimed, arises out of or involves the same subject matter as the one in which the nonresident has voluntarily attended. Lamb v. Schmitt, supra; Kirtley v. Chamberlin, 250 Iowa 136, 93 N. W. 2d 80; Miller v. Miller, 153 Neb. 890, 46 N. W. 2d 618; Velkov v. Superior Court, 40 Cal. 2d 289, 253 P. 2d 25, 35 A. L. R. 2d 1348; Livengood v. Ball, 63 Okl. 93, 162 P. 768, L. R. A. 1917C, 905. * * *"

In the case at bar the action in which Glass claimed immunity relates to the precise subject matter as the one in which Glass voluntarily attended. It is charged that Glass maliciously interfered with the business of the plaintiff in various respects including inducing a financially irresponsible corporation to commence an unwarranted action in the United States District Court. Hence, if the rule of *Calada* is followed the Court of Appeals erred in granting Glass immunity from suit thereby clearly indicating a conflict between determinations of courts of different circuits and warranting grant of the instant petition.

POINT II

Application of the law of the State of New York, in the case at bar, would have resulted in a finding denying Glass immunity

The respondent claims that the doctrine of *Erie* v. *Tompkins* is not applicable to the case at bar because the law of the State of New York and the federal law is the same. The law of the State of New York is set forth in *Koral* v. *Savory*, 254 App. Div. 692 (cited also in 84 A. L. R. 2d 444). As was held in that case a nonresident who had been named a party to an action was not immune from service of summons in such action while attending an examination as an officer of a corporation party to a suit. This case was *not overruled* in *New England Industries* v. *Margiotti*, 270 App. Div. 488. The subsequent case cited by the respondent, *Thermoid Co.* v. *Fabel*, 4 N. Y. (2d) 494 *does not overrule Koral.* In the *Thermoid* case the non-resident was *indicted* in New York and voluntarily attended in connection with the indictment. This is certainly a far different situation than where a nonresident officer of a corporation plaintiff enters the jurisdiction for the purpose of prosecuting litigation against the plaintiff who seeks relief in another action involving the precise subject matter. The law of New York still holds that a corporation officer who enters the jurisdiction to testify in connection with an action in which the corporation is a party is not immune from service of process in connection with any related action. Actually, of course, the case at bar involves stronger facts than *Koral*. In the case at bar the corporation is a *plaintiff* and has appeared in our courts in an attempt to enforce an alleged claim against the petitioner. In *Koral* the corporation

was a *defendant*. Obviously a party who seeks to utilize the processes of our courts cannot claim immunity from service of process in a related action.

POINT III

There is substantial constitutional violation if the determination of the Second Circuit Court of Appeals goes unreviewed.

In the response to the petition the respondent claims that no constitutional violation has occurred because "• • • Glass remains subject to the jurisdiction of the courts where he lives and works. • • •" But this is precisely wherein the constitutional violation occurs and involves the point of distinction between a situation involving an *alien officer of an alien corporation* and a situation involving an officer of a foreign corporation. As correctly stated by the respondent the courts have not seen fit to make this distinction and this is one of the reasons for urging review here. If a foreign corporation commences a suit in this jurisdiction and immunity is granted to the officer from suit in this jurisdiction there involves no substantial denial of due process. If the defendant in the action here has a claim against the officer of the foreign corporation he may prosecute this claim in the courts of the jurisdiction of the other state where the officer would be subject to personal suit. Since the principles of the United States Constitution would apply to the courts of the other state or to the other federal court the only prejudice suffered by the grant of immunity is one of inconvenience. However, where an *alien officer of an alien corporation* is involved the requirement that the alien officer must be sued in the *country of his resi-*

dence constitutes a denial of due process. The substance of law of the foreign country where suit would have to be brought could be so alien to the provisions of our constitution as to make such a suit meaningless. Furthermore the requirement that a suit be brought in the alien jurisdiction would mean that the United States citizen would have to subject himself to the jurisdiction of the alien court with all of the infirmities that this might involve. Hence, to permit an alien to organize a financially irresponsible alien corporation and utilize the alien corporation to sue in our courts and then grant the alien immunity from personal suit if he appears in this jurisdiction in order to aid in prosecuting the prior claim would, it is submitted, be a direct violation of the Fifth Amendment to the Constitution of the United States.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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